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In the Supreme Court of the United States

OCTOBER TERM, 1955

No. 487

JOSEPH A. ELLIOTT,
Petitioner,

vs.

PACIFIC FAR EAST LINE, INC.,
a corporation,
Respondent.

Brief of Respondent in Opposition to Petition for a Writ of Certiorari

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To the Honorable Chief Justice and Associate Justices of The Supreme Court of the United States:

Respondent opposes the petition for a writ of certiorari. By reason of inaccuracies and omissions; and also misleading statements and contentions with respect to law and fact, in the petition and supporting brief, respondent will reply thereto and in so doing will comply with Rule 40 promulgated by this Honorable Court.

SUMMARY OF ARGUMENT

1. On the first page of the petition, the attention of the court is directed to the fact that petitioner is "a merchant seaman". This brings into the foreground, at the threshold of the case, the indefensible case-made rule that every seaman is a "ward of the court". No court can be impartial as between two litigants if it proceeds on the theory that it is to act with respect to *one* of them in the *conjunctive* capacity of *court and guardian*. One of the essential requisites of due process of law is that the court considering and deciding any disputed question of fact or law, as between two litigants, be and remain absolutely impartial. If the *facts* show the relationship of guardian and ward with respect to the *parties*, the law applicable to that relationship will be applied; but the Court cannot lawfully assume the role of guardian.

2. Rule 23(g) provides that "if review of the judgment of a federal court is sought, the statement of the case shall also show the basis for federal jurisdiction in the court of first instance."

The first amended libel purports to state two separate and distinct causes of action. Petitioner, in the court of first instance, proceeded exclusively *in rem* with respect to both purported causes of action. The first cause of action is predicated upon the theory that petitioner was a member of the crew of the S.S. "Canada Bear"; that he had rendered personal services as such member of the crew pursuant to Shipping Articles; and that he had not been paid his *earned* wages up to and including the 18th day of June, 1952. Thus, the allegations of the first purported cause of action were sufficient to vest the court of first instance with jurisdiction *in rem* with respect thereto.

The second purported cause of action is much different and the allegations thereof are not sufficient to vest in the court of first instance jurisdiction *in rem*. If the second cause of action alleges facts sufficient to constitute any cause of action whatever, it is premised upon section 4529, Revised Statutes of the United States, as amended. (38 Stat. at L. 1164.) Said statute enacted by the Congress *created* a liability *in personam* against the *master or owner* of a vessel making a foreign voyage, in the event such master or owner refuses or neglects, without sufficient cause, to pay to a seaman his wages "within twenty-four hours after the cargo has been discharged, or within four days after the seaman has been discharged, whichever first happens." If the seaman alleges and proves a cause of action pursuant to the provisions of this statute, the master or owner "shall pay to the seaman a sum equal to two days' pay for each and every day during which payment is delayed beyond the respective periods" and said "sum shall be recoverable as wages in any claim made before the court." This is a penal statute in the sense that the dominant purpose thereof is punitive,—the imposition of punishment against the master or owner, individual or corporate, for an arbitrary refusal or neglect, *within the respective periods* specified in the statute, to pay a seaman's wages actually earned and due pursuant to the terms and conditions of the shipping articles.

The maxim *expressio unius est exclusio alterius* is applicable to a correct and logical construction of this statute. It says nothing to the affect that the *vessel* is responsible for such punishment or penalty. Therefore, the second purported cause of action was not within the *in rem* jurisdiction of the court of first instance.

3. The second purported cause of action fails to state facts sufficient to constitute a cause of action. General Admiralty Rule 22 provides, in part, as follows: "All libels in instance causes, civil or maritime, shall be on oath or solemn affirmation and shall state the nature of the cause, as, for example, that it is cause, civil and maritime, of contract, or a tort or damage, or of salvage, or of possession, or otherwise, as the same may be: and, if the libel be in rem, that the property is within the district; and if in personam, the names and places of residence of the parties so far as known. *The libel shall also propound and allege in distinct articles the various allegations of fact upon which the libelant relies in support of his suit,* * * *" (Emphasis supplied.)

The provisions of Revised Statutes of United States, Section 4511 (Title 46 U.S. Code, Section 564) state that shipping articles "shall be, as near as may be, in the form given in the table marked A, in the schedule annexed to this chapter * * *." Pursuant to the form of shipping articles for a foreign voyage thus provided for by statute "the said crew agree to conduct themselves in an orderly, faithful, honest, and *sober* manner, and to be at all times diligent in their respective duties and to be obedient to the lawful commands of the said master, or of any person who shall lawfully succeed him, and of their superior officers in everything relating to the vessel, and the stores and cargo thereof, *whether on board, in boats, or on shore;* and in consideration of which service, to be *duly performed,* the said master hereby agrees to pay the said crew, as wages, the sums against their names respectively expressed, * * *." (Emphasis supplied; Revised Statutes of the United States, Section 4612 (Schedule, Table A, following Title 46 U.S. Code, Section 713).)

The second cause of action of the first amended libel does not allege any of the following essential requisites:

A. That the libelant duly or at all performed his obligations as set forth in the shipping articles which he executed.

B. The date when the cargo was discharged.

C. The date upon which the libelant was discharged.

D. That there was a neglect or failure on the part of the master or owner, without sufficient cause, to pay petitioner's wages within twenty-four hours after the cargo had been discharged or within four days after petitioner's discharge, whichever first happened.

4. On the merits, the petitioner is trifling with the Court. Petitioner makes the false statement that "the decision of the Court of Appeals, for the Ninth Circuit, in the case upon * * * the right of the employer to take deductions not permitted by statute is in direct conflict with the applicable decisions of this Court" in the cases of *Isbrandtsen Co. Inc. v. Johnson*, 343 U.S. 779 and *Collie v. Ferguson*, 281 U.S. 52 (Petition, p. 12).

The truth of the matter is that the right of the respondent to take deductions not permitted by the statute was not involved in the appeal which the petitioner took from the final decree on the second cause of action entered by the court of first instance. The court of first instance, pursuant to *stipulations* made in open court by the same proctor who now represents the petitioner in this court, was presented with the following factual situation: Petitioner actually earned wages in the sum of $513.50 between May 8 and June 18, 1952; he was advanced the sum of $105.00; he had "slops" of $16.86; State Unemployment Benefits at 1% were taken out in the total sum of $5.77; that Social Security Payments were in the sum of $8.65; that a Withholding Tax in the sum of $88.20 was taken out (R., Vol. II, p. 4). As the trial pro-

ceeded, petitioner's proctor stipulated that the respondent was entitled to an additional deduction by reason of "log fines, as a proper charge, in the sum of $34.98" (R., Vol. II, p. 14). *Thereafter,* during the course of the trial, it was stipulated that the petitioner was entitled to a judgment of $254.04, on the first cause of action, *subject to the validity of a mutual release which he executed on July 25, 1952,* in the presence of a Deputy Shipping Commissioner (R., Vol. II, p. 27, l. 23 to and including p. 29, l. 22).

The fifth article, first cause of action, alleged that the balance due petitioner as wages earned by him was the sum of $379.24 (R., Vol. I, p. 3, l. 24 to p. 4, l. 5).

At the outset of the trial, proctor for petitioner, stated to the court, as follows: "That there is an issue as to the fine or fines in the sum of $34.98 which the libelant claims there were no fines and the respondent claims that they were entitled to under Federal Statute, 46 U.S.C. 701." (R., Vol. II, p. 4, l. 25 to p. 5, l. 3.)

According to the shipping articles (claimant's exhibit "B") the voyage ended at San Francisco, California, on June 29, 1952, and all of the members of the crew who were then aboard the vessel, and had performed their contract, were paid off in the presence of the master and a Deputy Shipping Commissioner and thus discharged.

Petitioner arrived at Alameda, California, on July 25, 1952 (R., Vol. II, p. 11). On said date, but *prior* to the time he was discharged as required by law in the presence of a Deputy Shipping Commissioner, he went to the office of respondent in San Francisco (R., Vol. II, p. 11, l. 22 to p. 12, l. 9). *Thereafter,* and on the same date, July 25, 1952, petitioner went to the office of the Shipping Commissioner in San Francisco, signed off the articles, and was thereby discharged (R., Vol. II, p. 15, l. 1; p. 16, l. 19; p. 17, l. 4-6). The

mutual release which the petitioner executed was the type of release required by the provisions of section 4552, Revised Statutes of the United States, 17 Stat. at L. 267. This statute provides, in part, that "such release, so signed and attested, shall operate as a mutual discharge and settlement of all demands for wages between the parties thereto, on account of wages, in respect of the past voyage or engagement." On the same date, July 25, 1952, petitioner participated in the preparation of a document in writing addressed to respondent in which it was stated that he had signed a mutual release and that there were no wages due for the period ending June 18, 1952. (R., Vol. II, p. 37).

Petitioner made no attempt whatever to rescind the mutual release which he had executed in the presence of the Deputy Shipping Commissioner. He did not even make any contact with the respondent with respect to any claim for wages, after he had executed the mutual release and had received his discharge, until his proctor wrote to respondent on April 23, 1953, long after the expiration of the four day period, making a demand "for the balance of his wages together with penalty wages of two days for one for each day after June 18, 1952." (R., Vol. II, p. 17, ll. 7-10; p. 56, ll. 16-24; Libelant's Exh. 1, Vol. II, p. 54).

Therefore, petitioner by his own voluntary conduct lulled the respondent into a justifiable sense of repose during the period of four days from and after his discharge at the office of the Deputy Shipping Commissioner on July 25, 1952, and is thereby estopped from claiming that there was any refusal or neglect, without sufficient cause, to make payment within said four-day period.

The mutual release was not void. Section 4530, Revised Statutes of the United States, 41 U.S. Stat. at L., p. 1006, provides, in part, as follows: "That notwithstanding any

release signed by any seaman under section 4552 of the Revised Statutes any court having jurisdiction may *upon good cause shown* set aside such a release and take such action as justice shall require * * *" (Emphasis supplied.) The court of first instance, in the pending case, set aside the mutual release and entered a final decree on the first cause of action in favor of petitioner and against respondent for "the sum of $254.04, together with interest at the rate of 7 per cent per annum from June 20, 1952 * * *, together with his costs incurred herein in the sum of $38.50, * * *" (R., Vol. I, p. 32, l. 23 to p. 33, l. 1).

Petitioner's notice of appeal refers only to the judgment of the court of first instance on the *second* cause of action and is *specifically* restricted to that part of said findings and judgment that failed to allow a recovery of double wages to the libelant, and from no other part thereof (R., Vol. I, p. 36).

STATEMENT OF THE CASE

Respondent will start at the beginning and set forth in chronological order what has happened so that this Court will get an accurate and complete picture of the case.

On May 8, 1952, petitioner signed shipping articles at San Francisco, California, for a voyage to one or more ports in the far east and back to a final Pacific Coast port of discharge in the United States, for a term of time not exceeding nine calendar months (Claimant's Ex. "B", R., Vol. II, p. 36). Pursuant to these shipping articles, the master of the vessel in consideration of Mr. Elliott's *specific* agreement to *conduct* himself in an *orderly, faithful,* honest *and sober* manner, agreed to pay him wages in the sum of $262.99 per *month*. This *monthly* wage rate was raised to $274.79 as of May 15, 1952. On June 18, 1952, only *ten* days

after the start of the *second* month of this *monthly* employment, the petitioner went ashore at Yokohama, Japan, knowing that the vessel was scheduled to sail the next day. He went to a moving-picture show and about 10 P.M., June 18, 1952, he began to drink. Shortly before midnight he went from a drinking place into a taxicab to take him to where he could get a water taxi and did not know anything that happened after getting into the taxicab until he woke up the next morning in the hospital (R., Vol. II, pp. 7-8, p. 45). When Mr. Elliott woke up in the hospital he telephoned to a person designated by *him*, in his testimony at the trial, as the "agent for the Pacific Far East in Yokohama," and told him who he was and where he was and the "agent" told Mr. Elliott that he knew Mr. Elliott "was in there." (R., Vol. II, p. 8). "The agent particularly asked me what I did want to do, and I asked him how about sending me some money when he gets a chance. He asked me how much. I told him $50.00." He said, "I will bring it to you." He brought it to me approximately one week later and he told me "that he had been so busy, that is the reason he wasn't able to get over there any sooner." The $50.00 was in Japanese yen. Mr. Elliott signed a receipt for it (R., Vol. II, pp. 9-10). He received no other money while he was in Japan (R., Vol. II, p. 10).

Archibald Cook, the master of the vessel, was of the opinion on June 19, 1952, that Mr. Elliott had deserted the vessel at Yokohama, Japan. He demonstrated that conclusion by making an entry in the official log, as follows: "1600. June 19, 1952. Yokohama, Japan. Joseph Elliott, Wiper, deserted vessel at this port." (Claimant's Ex. "C"; R., Vol. II, p. 80). According to the shipping articles (Claimant's Ex. "B"; R., Vol. II, p. 36) the voyage ended at San Francisco, California, on June 29, 1952. The shipping arti-

cles demonstrate that as of June 29, 1952, the master of the vessel was still of the opinion that Mr. Elliott had deserted the vessel. Line 37 of these shipping articles contains the entry that Joseph A. Elliott had deserted the vessel at Yokohama, Japan, on June 18, 1952. On *July* 17, 1952, some person other than Archibald Cook, the master of the vessel who had made the entry on the official log with reference to Mr. Elliott's desertion, made a notation on the official log, as follows: "Charge of desertion cancelled by Pac. Far East Lines as seaman was in hospital—see attached. R.A.F. 7/17/52." The entry on line 37 of the shipping articles *(supra)* was also altered by some person other than Archibald Cook and it is obvious that the alteration was made on or after July 17, 1952. The word "deserted" is circled and the words "Charge cancelled—see Log-Book" were hand-printed above the circled word "deserted."

On June 30, 1952, one day after the end of the voyage, Mr. Elliott "got out of the hospital" (R., Vol. II, p. 11). Presumably, therefore, Mr. Elliott was in a hospital somewhere in Japan on June 29, 1952. The date when he left Japan does not appear anywhere in the record. What he did or where he was between June 30, 1952 and the date he left Japan does not appear in the record, but when he got out of the hospital on June 30, 1952, the "Canada Bear" was not in Yokohama. (R., Vol. II, p. 10). He was repatriated back to the United States on the "China Bear" one of the ships of the Pacific Far East Line, arriving at Alameda, California, on July 25, 1952 (R., Vol. II, pp. 10-11).

What happened after petitioner got back to the United States on July 25, 1952 is as follows: I went to the office of the Pacific Far East Line in San Francisco on July 25, 1952. "I went to the port purser's office to get my voucher, moneys that I figured was due me, the balance of the amount that

was earned during the particular voyage. Whoever the purser was, whoever the gentleman was at the window at the port purser's office, looked through the file of vouchers, and when he pulled mine out, he said, 'Mr. Elliott, this is a coincidence. You have $579 earnings and $579 deductions.'" (R., Vol. II, pp. 11-12.) While at the office of Pacific Far East Line in San Francisco I received no money on account of my wages. I later went to the office of the Shipping Commissioner in San Francisco and at that place I received no money on account of my wages. I signed off the articles on July 25, 1952, in the office of the United States Shipping Commissioner (R., Vol. II, pp. 15-16). At the time he signed off the shipping articles, the notation "no wages due" was on line 37. At the same time, July 25, 1952, petitioner signed a Certificate of Mutual Release addressed to Pacific Far East Line in which it was stated that there were "no wages due" (Claimant's Ex. "A"; R., Vol. II, pp. 36-38).

Before going to the office of the United States Shipping Commissioner the petitioner contacted his Union.

"Q. Mr. Elliott, didn't you, after leaving Pacific Far East Line on July 25, 1952, contact your union relative to this?

A. Just a routine appeal.

The Court: But you did talk about it?

The Witness: Yes, sir.

The Court: Did you tell the union representative about the $254.04?

The Witness: Yes, sir, and he was under the same conclusion I was, he figured the same, that I didn't have any coming to me any more than I thought * * *" (R., Vol. II, p. 44).

Q. Did you go back to the Pacific Far East Line office in San Francisco at any time within the four days after you were discharged on July 25, 1952, and make any demand for wages?

* * * * * * *

The Witness: No. (R., Vol. II, pp. 45-46.)

Q. Did you at any time later contact the Pacific Far East Line with reference to the wages?

A. The only time Pacific Far East was contacted again was through you, I think, Mr. Fall." (R., Vol. II, p. 17.)

The contact referred to was a letter dated April 23, 1953 (Libellant's Ex. 1; R., Vol. I, p. 54) written by Mr. Fall to Pacific Far East Line, Inc., 141 Battery Street, San Francisco 11, California. The letter, in part, reads as follows:

"It appears that Elliott was hospitalized in Yokohama, Japan about June 18, 1952. However the Captain of the 'Canada Bear' did not leave his wages for him at that Port, nor has he ever been paid the same. He had drawn about $200.00 and has never received a statement of this item. Demand is hereby made upon you for the balance of his wages, *together with penalty wages of two days for one for each day after June 18, 1952*. You have failed to give him a statement of the overtime due to him, but have given him a form W-2, indicating his wages to be $579.24.

I have been instructed to institute an action for the recovery of *wages and penalty* if a settlement cannot be made in the immediate future." (Emphasis added.)

Petitioner's first amended libel *in rem* was filed on June 17, 1953. (R., Vol. I, pp. 208). It is as follows:

"The libel of Joseph A. Elliott, late a seaman aboard the S. S. 'Canada Bear' in an action *in rem* against the S. S. 'Canada Bear,' for wages, civil and maritime, respectfully shows:

First: That at all times herein mentioned the S. S. 'Canada Bear' was and is an American Vessel, and will be during the pendency of process herein, within the jurisdiction of this Honorable Court.

Second: That the libelant is a seaman within the designation of persons permitted to sue herein without furnishing bond for, or prepayment of, or making deposit to secure fees and costs for the purpose of entering in and prosecuting suits conformable to the provisions of Title 28, Sec. 1916, U. S. C. A.

Third: That on or about the 8th day of May, 1952, at San Francisco, California, the libelant signed regular Shipping Articles for a voyage on the S. S. 'Canada Bear' not exceeding 12 calendar months, and back to the continental United States. That on said 8th day of May 1952, libelant entered into his duties as a member of said crew in the capacity of a Wiper, at wages or salary of $275.00 per month, which were increased to the sum of $286.00 per month.

Fourth: That on the 18th day of June, 1952, libelant fell ill while the said S. S. 'Canada Bear' was at Yokohama, Japan, and was taken to a hospital for treatment, and was required to remain in said hospital until his vessel had sailed from Yokohama, and by reason thereof, libelant was repatriated to the United States direct from Yokohama, Japan, and did not join his vessel.

Fifth: That from the 8th day of May, to and including the 18th day of June, 1952, libelant earned as Wiper on the said S. S. 'Canada Bear,' the sum of $579.24. That libelant drew upon his wages during his employment, the approximate sum of $200.00, but libelant has not been rendered a statement of account, nor has he received any portion of the sum of $379.24, balance of wages earned by him from respondent upon (sic) to the date of May 18, 1952.

Sixth: All and singular the premises are true and within the Admiralty and maritime jurisdiction of the United States and of this Honorable Court.

For a Second and Distinct Cause of Action Libelant Alleges:

Seventh: Libelant incorporates herein by reference Articles First, Second, Third, Fourth, Fifth, Sixth of his First Cause of Action as if fully set forth herein.

Eighth: That pursuant to Title 46, Section 596, U.S. Code, and Title 46, Section 597, U. S. Code, libelant became entitled to all of his wages at the time he left the S. S. 'Canada Bear' on June 18, 1952. That none of libelant's wages were left at Yokohama, Japan.

Ninth: That demand was made upon respondent at San Francisco, California, on the 25th day of July, 1952 for wages due libelant, but payment was refused.

Tenth: That on the 18th day of June, 1952, prior to the sailing of the S. S. 'Canada Bear' from Yokohama, Japan, libelant advised the agent of the S. S. 'Canada Bear' that libelant was in the hospital. That said agent advised libelant that he—the agent, would notify the Master of the S. S. 'Canada Bear' as to the libelant's whereabouts, prior to the sailing of said vessel. That libelant is informed and believes, and therefore alleges, that the Master of the S. S. 'Canada Bear' was advised prior to his sailing that libelant was in the hospital. That nothwithstanding the said knowledge upon the part of the Master of the S. S. 'Canada Bear,' the said Master refused, failed and neglected to pay to the libelant herein, or to leave with the agent of the S. S. 'Canada Bear' at Yokohama, Japan, or to leave with the United States Consul at Yokohama, Japan, the wages due libelant for his services on the S. S. 'Canada Bear.'" (R., Vol. I, pp. 2-5).

On June 26, 1953, respondent filed its answer to the first amended libel. In so far as it is pertinent, said answer reads as follows:

"I.

Admits the allegations in the First Article.

II.

Admits the allegations in the Second Article.

III.

Admits that on the 8th day of May, 1952, at San Francisco, California, the libelant signed regular Shipping Articles for a voyage on the S. S. 'Canada Bear' for a period not exceeding nine months and denies that said Articles provided for a voyage not exceeding twelve calendar months. Denies that on said 8th day of May, 1952, libelant entered into his duties at wages or salary of $275.00 per month or that said wages were increased to the sum of $286.00 per month and alleges that the wage rate provided in said Articles was at the rate of $262.99 per month and that said wage rate was increased as of May 15, 1952, to the rate of $274.79 per month.

* * * * * * *

IV.

Denies that on the 18th day of June, 1952, the libelant fell ill while the S. S. 'Canada Bear' was at Yokohama * * * Claimant denies that by reason of any illness the libelant was required to remain in any hospital until his vessel had sailed from Yokohama, or that by reason of any illness the libelant was repatriated to the United States direct from Yokohama, Japan, or did not rejoin his vessel by reason of any illness and alleges that the only reason for the libelant's failure to rejoin his vessel at Yokohama, Japan, was that the libelant voluntarily became intoxicated and was unable by reason of his intoxication to rejoin his vessel or to perform his contract.

V.

Denies that from the 8th day of May, to and including the 18th of June, 1952, the libelant earned as wiper, or otherwise, on the S. S. 'Canada Bear,' the sum of $579.24 and alleges in this respect that libelant was not, from the time he boarded said vessel up until June 18, 1952, at all times in a condition which would enable him to earn his wages and that the total wages in accordance

with the contract of employment which would have been due if the libelant had performed the said contract, was the sum of $576.50. Claimant further alleges that on or about the 25th day of July, 1952, the libelant executed a mutual release as required by Revised Statutes of the United States 4552 wherein he agreed that there were no wages whatever due him and said mutual release is on file at the office of the United States shipping Commissioner at San Francisco, California, and Claimant denies that there is due to the libelant the sum of $379.24, or any other sum whatsoever or at all.

VI.

Denies that all or singular the premises are or that any thereof is true excepting as hereinabove specifically admitted and admits that the premises are within the Admiralty and Maritime jurisdiction of the United States and of this Honorable Court.

VII.

Claimant incorporates herein by reference thereto its answer to the First, Second, Third, Fourth, Fifth and Sixth Articles of the first cause of action as if fully set forth herein.

VIII.

Denies that by reason of any statute, or otherwise, libelant became entitled to wages in any sum whatsoever or at all at the time he left the S. S. 'Canada Bear' on June 18, 1952. Admits that no wages were left at Yokohama, Japan, but denies that there was any duty or obligation to leave any wages at Yokohama, Japan.

IX.

Denies that any demand was made upon respondent on the 25th day of July, 1952, for any wages due libelant and denies that any wages were due libelant and admits that no payment was made to libelant on said 25th day of July, 1952.

X.

Claimant has no information or belief upon the subject sufficient to enable it to answer the allegations in the Tenth Article and placing its denial thereof upon said ground, denies said allegations and each thereof." (R., Vol. I, pp. 9-13).

In addition to the testimony, documentary evidence and pleadings referred to hereinabove, the record shows as follows:

During the trial of the action it was stipulated that petitioner signed on at $262.99 per month; that this monthly wage was increased to $274.79 as of May 15, 1952; that he actually earned wages in the sum of $513.50 between May 8, 1952 and June 18, 1952; that he was advanced the sum of $105.00; that he had "slops" of $16.86; that state unemployment benefits at 1 per cent ($5.77) were taken out; that social security benefits were in the sum of $8.65; and that withholding tax in the sum of $88.20 was taken out (R., Vol. II, pp. 3-4).

At the commencement of the trial petitioner's proctor stated that there was an issue as to the right of the respondent to deduct fines in the sum of $34.98, in that "the libellant claims there were no fines and the respondent claims that they were entitled to under federal statute, 46 U. S. C. 701." (R., Vol. II, pp. 4-5). As the trial proceeded and petitioner admitted that the amount of his log fines would probably amount to $34.98, his proctor agreed that the "$34.98 should be added to the other items he (libellant) was charged with." (R., Vol. II, p. 14). With this concession, made by petitioner *during the course of the trial,* it was *then* agreed that *subject to an existing mutual release* signed by petitioner at the office of the United States Shipping Commissioner on July 25, 1952, the balance of wages earned was $254.04 (R., Vol. II, pp. 25-28).

The record is in a nebulous condition with reference to the details of the amount of the expenditures or obligations which were incurred by the respondent over and above the total amount of the cash advances made to the petitioner and the deductions which were conceded, *after the trial of the case commenced,* to be proper, but it was stipulated that the sum of $254.04 was deducted on account of hospital bills and other expenses "due to Mr. Elliott's misconduct" (R., Vol. II, p. 27 and pp. 29-30). It was also stipulated by petitioner's proctor that "it was possible, when this voyage was completed and before the seaman signed off, for the boat to have sued him for the amount of the hospital bill." (R., Vol. II, p. 39).

This was a valuable consideration supporting the execution of the *mutual* release.

At no time during the trial did the petitioner contend, excepting by an attempt to introduce a purported "Certificate of Discharge," that he had been discharged in Japan. To the contrary, he testified as follows:

> "Q. Is there any way you could get your discharge from that vessel without signing off?
>
> A. None that I know of." (R., Vol. II, p. 15).

> "The Witness: * * * You have to go before the United States Shipping Commissioner to sign a foreign voyage or a coastal voyage, and you have to go before the United States Shipping Commissioner to get your discharge." (R., Vol. II, p. 16).

> "The Court: At the end of the voyage the seaman sings off, if I understand it correctly, and if I haven't got it correctly, you can correct me, and when the seaman signs with a boat, the boat has some hold on that seaman until he is released; isn't that correct?
>
> Mr. Fall: That is correct.
>
> The Court: In other words, he cannot get a job with another boat until he gets a release from the boat he has signed with.

Mr. Fall: That's right.

The Court: So really and truly, now, the boat owner, can we put it this way, has a right to his services until the boat owner releases him to other employment?

Mr. Fall: Yes. He is bound to the vessel until he signs off." (R., Vol. II, p. 40).

"The Court: You mean this certificate, then, was signed in San Francisco after the seaman had come back to the United States?

Mr. Fall: Yes. That was the only place he could possibly have obtained it other than from the United States Consul in Japan." (R., Vol. II, p. 76).

The "certificate" mentioned immediately hereinabove by Judge Westover is a purported "Certificate of Discharge" (Libelant's Ex. 2 for Ident.; R., Vol. II, p. 74). Petitioner's proctor tried to introduce the purported "Certificate of Discharge" because the Deputy United States Shipping Commissioner who prepared it inserted *his* conclusion that the Petitioner had been discharged on June 18, 1952, at Yokohama, Japan. Respondent objected to the offer of the document in evidence on each of the following grounds, severally:

"One, the figures and language '18 June 1952' following the printed words 'Date of Discharge' are and each thereof is a conclusion and opinion of whoever typed the figures and words on this piece of paper. Two, the document is not competent as proof of any fact in issue in this case. Three, there is no evidence proving or tending to prove that the master of the vessel had anything whatsoever to do with this so-called certificate of discharge, and the document on its face purports to have a typewritten signature, and there is no evidence proving or tending to prove that the master was even present or had anything whatsoever to do with the preparation of this certificate or any part or portion thereof." (R., Vol. II, p. 75.)

The objection was sustained (R., Vol. II, p. 80).

The Mutual Release which was executed by the petitioner in the presence of a Deputy United States Shipping Commissioner at San Francisco, California on July 25, 1952, was in full force and effect from the time of its execution up to the time the trial judge set the same aside in the findings of fact, conclusions of law and final decree, signed, docketed and entered on April 12, 1954. In this respect, the record shows the following:

> "The court finds that the release executed by the libelant was not made by him with a full understanding of his rights, and that there was no consideration whatsoever for the same." (R., Vol. I, p. 28, lines 7-10.)
>
> "1. That the release executed by the parties is set aside for good cause shown; * * *" (R., Vol. I, p. 29, lines 10-11.)

ARGUMENT ON THE LAW AND MERITS

A. At the threshold, the fiction that all seamen are "wards of the court" is challenged as indefensible.

This fiction should be laid to rest alongside the corpse of "trial de novo" which was effectively buried in the late case of *McAllister v. United States* (348 U.S. 19, 75 S.Ct. 6).

One of the reasons supporting respondent's contention that the neglect or failure to pay the earned wages within four days after petitioner's discharge was not without sufficient cause, is that the mutual release executed by petitioner was, at least, presumptively valid and respondent was entitled to rely on its presumptive validity until the petitioner, by affirmative evidence, induced some court of competent jurisdiction to set it aside upon the ground that there existed good cause to do so. Therefore, it appears necessary to discuss the general subject of the validity of releases executed by persons whose occupational status is that of seaman and the burden of proof with reference thereto.

Respondent is aware of the fact that for over one hundred years immediately last past various federal courts have by *obiter dicta* stated that "seamen are wards of the admiralty"; "seamen are wards of the admiralty court"; "they are emphatically the wards of the admiralty"; and there is an analogy "between seamen's contracts and those of fiduciaries and beneficiaries." The amazing thing about this situation is that there seems to be no decision in which it appears that any ship owner or ship operator has ever challenged the validity of these assumptions or pointed out that they are premised exclusively upon an arbitrarily discriminatory and basically unsound classification of *all* seamen as persons who are by reason of old age, disease, *weakness of mind,* or other cause, unable, unassisted, properly to manage and take care of themselves or their property and by reason thereof are likely to be deceived or imposed upon by artful or designing persons.

No litigant is entitled to the "protection of the courts" in the sense that any court may lawfully act in the conjunctive capacity of court and guardian. The courts have inadvertently created the basically fallacious fiction that seamen are "wards of the court" in cases where seamen were engaged in controversies with persons who *were* their employers at the time of the happening of events out of which subsequent claims arose.

The Fifth Amendment, Constitution of the United States, provides that no person (and this includes a former employer of a seaman) shall be deprived of property without due process of law. If, in litigation between a seaman and a former employer, the court hearing and deciding any disputed question of fact or law deems itself the *guardian* and the seaman its *ward,* the court could not be impartial. The temptation to favor the claims of the "ward" against those

of a stranger and to give the ward the benefit of all doubts would effectively tend to deprive the stranger of a fair trial of issues of fact or law. For example, assume that John Doe is a duly appointed judge of the United States District Court. He is also, in his non-judicial capacity, the duly appointed guardian of Richard Roe, an "infant" of the age of twenty years and a seaman. There is no relationship of any kind between John Doe and Richard Roe excepting that of guardian and ward. If Richard Roe commenced an action for damages against a former employer under the Jones Act or the general maritime law is it not true that the guardian and ward relationship would preclude John Doe from hearing or adjudicating any issue of law or fact between the litigants?

There is no compliance with the right to due process of law unless the court hearing and deciding the issues of fact or law is *unqualifiedly* impartial (*Inland Steel Co. v. Nat. Lab. Rel. Bd.*, 109 F.2d 9; and *Nat. Lab. Rel. Bd. v. Ford Motor Co.*, 114 F.2d 905). No group of human beings acting as a court can, with *certainty*, avoid being biased in favor of the contentions of one they regard as their ward. The testimony of the ward would naturally have more weight than that of a stranger and the ward's argument with reference to controversial questions of law would naturally be viewed as more sound than that of the stranger. There should be an *abrupt and permanent repudiation* of the *fiction* that seamen are *wards of the court*.

Any seaman who is a natural born citizen, has attained the age of thirty five years and has been for fourteen years a resident within the United States is *legally* qualified to be president or vice-president of the United States; if he has attained "to the age of twenty five years," has been for seven years a citizen of the United States and an inhabitant of that

state in which he shall be chosen, he is *legally* qualified to be a representative; and if he has attained "to the age of thirty years, and been nine years a citizen of the United States" and an inhabitant of that state for which he shall be chosen, he is *legally* qualified to be a senator (U.S. Constitution, Art. 1, sections 2 and 3). Why, therefore, is he not also legally qualified to execute a presumptively valid release or any other contract?

If the Court is interested in this subject, it is more fully developed in the Appendix.

B. The District Court of the United States, Southern District of California, was without jurisdiction in respect of the second cause of action.

It is true that a seaman is entitled to proceed *in rem* to foreclose his lien for wages due as payment for personal services rendered while a member of the crew. The reason supporting his right to proceed *in rem* is similar to the bases of the right of a land-mechanic to a lien upon the thing which has been the object of his labor.

The *first* cause of action, first amended libel, supra, was for wages allegedly earned during the existence of the contractual relationship between petitioner and respondent, as evidenced by the shipping articles. That cause of action is not involved here. The trial court set aside the mutual release and entered a final decree for earned wages. *Petitioner* took no appeal from *that part of the final decree*. The trial court was vested with jurisdiction *in rem* with respect to said *first* cause of action.

There is, however, a substantial question with respect to the trial court's jurisdiction *in rem* over the *second* cause of action.

No seaman is entitled to collect *all* of his *earned* wages until he is discharged in the manner provided by applicable Acts of Congress, *excepting* when he is injured or suffers an illness in the service of the vessel; or when the master of a vessel of the United States fails to comply with a demand for "one-half part of the balance of his wages earned and remaining unpaid at the time when such demand is made at every port where such vessel, after the voyage has been commenced, shall load or deliver cargo before the voyage is ended" (R.S. § 4530). These exceptions are *not* involved here.

No seaman has a "cause of action" pursuant to which he may recover "a sum equal to two days' pay for each and every day during which payment is delayed beyond" "twenty-four hours after the cargo has been discharged" "or within four days after the seaman has been discharged" *whichever first happens*, in the event of a refusal or neglect by the "*master* or owner" "to make payment in the manner hereinbefore mentioned, *without sufficient cause*" pursuant to the General Maritime Law. Such "cause of action" is strictly and exclusively *statutory*, and is based solely upon the provisions of section 4529, Revised Statutes of the United States, 38 U.S. Stat. at L., p. 1164, the pertinent part of which reads as follows:

> "The master or owner of any vessel making coasting voyages shall pay to every seaman his wages within two days after the termination of the agreement under which he was shipped, or at the time such seaman is discharged, whichever first happens; and in case of vessels making foreign voyages, * * * within twenty-four hours after the cargo has been discharged, or within four days after the seaman has been discharged, whichever first happens; and in all cases the seaman shall be entitled to be paid at the time of his discharge

on account of wages a sum equal to one-third part of the balance due him. Every master or owner who refuses or neglects to make payment in the manner hereinbefore mentioned without sufficient cause shall pay to the seaman a sum equal to two days' pay for each and every day during which payment is delayed beyond the respective periods, which sum shall be recoverable as wages in any claim made before the court; * * *"

The Congress has thus deliberately, and we must assume, consciously, *omitted* any proviso to the effect that the *vessel* may be proceeded against *in rem*. The statute provides that the cause of action thereby created is one *in personam*. The persons responsible are "the *master or owner*". It is a penal statute in the sense that the dominant purpose is *punishment* for the violation" (*McCrea v. United States*, 70 F.2d 632, 634-635). It is not a liability of the owner of the vessel which can be expunged or reduced by a resort to limitation of liability proceedings. The liability is also imposed *in personam* equally upon the *master of the vessel*. "Due process of law" as used in Amendment V, Constitution of the United States, prohibits any arbitrarily discriminatory distinction between the defenses or excuses which the law may accord or recognize as between the master of the vessel on the one hand and the owner thereof on the other. If the owner were permitted to limit his loss to his interest in the *vessel* by surrendering it in an *in rem* proceeding he would be given a substantial right not available to the master of the vessel who has no proprietary interest therein.

This Court has said that the use of the language "refuses or neglects to make payment * * * without sufficient cause" "indicates a purpose to protect seamen from delayed payments of wages by the imposition of a liability which is not

exclusively compensatory, but designed to prevent, by its *coercive* effect, *arbitrary* refusals to pay wages, and to induce prompt payment when payment is possible." (Emphasis supplied; *Collie v. Ferguson*, 281 U.S. 52, 55-56; 74 L.ed. 696, 698.) It is also true that in the case last mentioned, the seamen involved proceeded *in rem;* but none of the parties *disputed* their right to do so. The question of *in rem* jurisdiction in the district court of the United States lurked in the background and was *assumed* by this Court to have existed. This does not give rise to the doctrine *stare decisis* (*Pacific S. S. Co. v. Peterson*, 278 U.S. 130; 73 L.ed. 220).

The last act of petitioner which this Court has held in some of the cases, to be an event "in the service of the ship" took place when he became intoxicated, to the point of oblivion, over-stayed his shore-leave and *breached* his *statutory* contractual duty to remain *sober* "whether on board, in boats, *or on shore*" (R.S. 4612). Therefore, he ceased to earn any wages on June 18, 1952 because that was the date upon which he ceased to perform any personal service which would have entitled him to wages. Thus, his right, if any, to a lien upon the vessel must be restricted to events which occurred up to and including that date.

The cause of action for earned wages accrues at the time a seaman is discharged. The cause of action for "two days' pay for one" accrues, if at all, four days after the discharge. They are separate and distinct causes of action. The first may be prosecuted *in rem* or *in personam*. The second may be prosecuted only *in personam*. "* * * the increased payment for waiting time is *not* denominated *wages* by the statute, and the direction that it shall be recovered as wages does not purport to affect the condition prerequisite to its accrual that refusal or neglect to pay shall be without suffi-

cient cause." (Emphasis supplied; *Collie v. Ferguson,* 281 U.S. 52, 55; 74 L.ed. 696, 698.)

As is said hereinabove, the statute imposes the liability for the penalty or punishment upon the "master or owner". This is a penal statute and therefore the maxim *expressio unius est exclusio alterius* is particularly applicable. Therefore, the vessel is not liable. For these reasons, respondent contends that the district court of the United States, Southern District of California, was without jurisdiction *in rem* with respect to the *second* cause of action. The jurisdiction of the United States Court of Appeals, Ninth Circuit, and that of this Court is derivative. Therefore, the petition for a writ of certiorari should be dismissed for lack of jurisdiction.

C. Petitioner has failed to state facts sufficient to constitute a cause of action pursuant to which he would be entitled to recover in accordance with the provisions of Section 4529, Revised Statutes of the United States.

This point has been sufficiently covered in paragraph 3, summary of argument.

D. The petition fails to show that the decision of the Court of Appeals is in conflict with that of any other Court of Appeals on the same matter; or has decided any federal question in a way in conflict with applicable decisions of this Court; or has departed from the accepted and usual course of judicial proceedings or sanctioned such a departure by the Court of first instance.

On the basis of the evidence introduced during the trial, in the court of first instance, that court could not have found as a fact that the petitioner was discharged at Yokohama, Japan, on or about June 18, 1952, or at any other time; or that he was entitled to be paid his earned

wages within four days of the time the vessel sailed from that port.

Section 4530, Revised Statutes, 45 U.S. Stat. at p. 1006, as pertinent here, reads as follows:

> "Every seaman on a vessel of the United States shall be entitled to receive on demand from the master of the vessel to which he belongs one-half part of the balance of his wages earned and remaining unpaid at the time when such demand is made at every port where such vessel, after the voyage has been commenced, shall load or deliver cargo before the voyage is ended, and all stipulations in the contract to the contrary shall be void: *Provided*, Such a demand shall not be made before the expiration of, nor oftener than once in five days nor more than once in the same harbor on the same entry. Any failure on the part of the master to comply with this demand shall release the seaman from his contract and he shall be entitled to full payment of wages earned. And when the voyage is ended every such seaman shall be entitled to the remainder of the wages which shall be then due him, as provided in section 4529 of the Revised Statutes; *Provided further*, That notwithstanding any release signed by any seaman under section 4552 of the Revised Statutes any court having jurisdiction may upon good cause shown set aside such a release and take such action as justice shall require * * *."

There is no evidence whatever in the record with reference to the following elements:

1. That the vessel loaded or delivered cargo at Yokohama, Japan.
2. That while the vessel was at Yokohama, Japan, the petitioner demanded from the master of the vessel one-half part of the balance of his wages earned and remaining unpaid.

3. That there was any failure on the part of the master to comply with any such demand.
4. That he was discharged in a foreign port by a consular officer.

There is no evidence whatever in the record which will support a finding that the petitioner was released from his contract or entitled to full payment of wages earned pursuant to the provisions, or any thereof, set forth in said Section 4530.

Section 4530, Revised Statutes, also indicates that even in cases where there has been a failure on the part of the master to comply with a demand for one-half part of the balance of wages earned and remaining unpaid at the time when such demand is made at a port where the vessel shall load or deliver cargo before the voyage is ended does not amount to a "discharge" even though the seaman is released "from *his* contract." Immediately after the sentence which provides for the release of the seaman from his contract by reason of a failure on the part of the master to comply with a demand for one-half part of the balance of wages the section proceeds as follows:

> "And when the voyage is *ended* every *such* seaman shall be entitled to the remainder of the wages which shall be then due him"

as provided in Section 4529, Revised Statutes.

Section 4530, Revised Statutes, does not provide that a failure on the part of the master to comply with a demand made in accordance therewith shall release the master or the owner of the vessel from his or its contract as set forth in the Shipping Articles. Said Section 4530 does not provide that the release of the seaman from his contract entitles the master of the vessel to discharge the seaman or acts, *ipso facto,* as a discharge of the seaman.

There are also other statutes of the United States which seem to be obviously pertinent to a logical determination of the manner in which an American seaman may be discharged from an American merchant vessel in a foreign port. These statutes are Sections 4573, 4574, 4576, 4580 and 4581, Revised Statutes of the United States.

Section 4573, Revised Statutes, 2 Stat. at L. 203, 5 Stat. at L. 370, reads, in part, as follows:

> "Before a clearance is granted to any vessel bound on a foreign voyage * * *, the master thereof shall deliver to the collector of the customs a list containing the names, places of birth and residences, and description of the persons who compose his ship's company; to which list the oath of the captain shall be annexed, that the list contains the names of his crew, together with the places of their birth and residence, as far as he can ascertain them; and the collector shall deliver him a certified copy thereof."

Section 4574, Revised Statutes, 2 Stat. at L. 809, provides, in part, as follows:

> "In all cases of private vessels of the United States sailing from a port in the United States to a foreign port, the list of the crew shall be examined by the collector for the district from which the vessel shall clear, and if approved by him, shall be certified accordingly. No person shall be admitted or employed on board of any such vessel unless his name shall have been entered in the list of the crew, approved and certified by the collector for the district from which the vessel shall clear."

Section 4576, Revised Statutes, 29 Stat. at L. 688, 34 Stat. at L. 100, provides, in part, as follows:

> "The master of every vessel bound on a foreign voyage * * * shall exhibit the certified copy of the list

of the crew to the first boarding officer at the first port in the United States at which he shall arrive on his return, and also produce the persons named therein to the boarding officer, whose duty it shall be to examine the men with such list and to report the same to the collector; * * * For each failure to produce any person on the certified copy of the list of the crew the master and owner shall be severally liable to a penalty of $400, * * *; but such penalty shall not be incurred on account of the master not producing to the first first boarding officer any of the persons contained in the list who may have been discharged in a foreign country with the consent of the consul or vice consul there residing, certified in writing, under his hand and official seal, to be produced to the collector with the other persons composing the crew, nor on account of any such person dying or absconding or being forcibly impressed into other service of which satisfactory proof shall be exhibited to the collector."

It thus appears, without the slightest question, that unless the master of the S. S. "Canada Bear" was able to show, in the absence of producing Joseph A. Elliott to the first boarding officer at the first port in the United States at which he arrived on his return from Yokohama, Japan, that Elliott had "been discharged in a foreign country with the consent of the consul or vice consul there residing, certified in writing, under his hand and official seal" at the time he produced to the collector the other persons composing the crew, or was able to exhibit satisfactory proof to the collector that Elliott had died or absconded or had been forcibly impressed into other service, then the master and the owner of the vessel would have been subject to a penalty of $400.00.

If the only type of discharge of a seaman in a foreign country which will excuse the master of a vessel from the duty of producing Elliott to the first boarding officer at

the first port in the United States at which the master arrived on his return was a discharge in a foreign country with the consent of the consul or vice consul there residing, certified in writing, under his hand and official seal, then it seems to follow that no seaman may be discharged in a foreign port excepting in accordance with the provisions of Sections 4580 and 4581, Revised Statutes, (4580) 23 Stat. at L. 54 *and* (4581) 23 Stat. at L. 55; 25 Stat. at L. 80; 30 Stat. at L. 759; 38 Stat. at L. 1185.

Section 4580 is as follows:

> "Upon the application of the master of any vessel to a consular officer to discharge a seaman, or upon the application of any seaman for his own discharge, if it appears to such officer that said seaman has completed his shipping agreement, or is entitled to his discharge under any Act of Congress or according to the general principles or usages of maritime law as recognized in the United States, such officer shall discharge said seaman, and require from the master of said vessel, before such discharge shall be made, payment of the wages which may then be due said seaman; but no payment of extra wages shall be required by any consular officer upon such discharge of any seaman except as provided in this Act."

Section 4581 is as follows:

> "If any consular officer when discharging any seaman, shall neglect to require the payment of and collect the arrears of wages and extra wages required to be paid in the case of the discharge of any seaman, he shall be accountable to the United States for the full amount thereof. The master shall provide any seaman so discharged with employment on a vessel agreed to by the seaman, or shall provide him with one month's extra wages, if it shall be shown to the satisfaction of the consul that such seaman was not discharged for neglect of duty, incompetency, or injury incurred on the vessel. If the seaman is discharged by volun-

tary consent before the consul, he shall be entitled to his wages up to the time of his discharge, but not for any further period. If the seaman is discharged on account of injury or illness, incapacitating him for service, the expenses of his maintenance and return to the United States shall be paid from the fund for the maintenance and transportation of destitute American seamen."

The foregoing statutes considered together clearly indicate that there is only one method by which a seaman may be discharged in a foreign port and that even the *mutual* consent of the master and the seaman is not sufficient to constitute a discharge. It is more obvious that neither the seaman nor the master can, by unilateral action, accomplish a discharge in a foreign port. Even where there is a voluntary consent by both of them it must be communicated to the consular officer and such discharge must be "before the consul."

Respondent contends that the true meaning of the words "the seaman has been *discharged,*" as they are used in Section 4529, Revised Statutes, cannot be ascertained without giving careful consideration and effect to the provisions of Sections 4573, 4574, 4576, 4580 and 4581 of the Revised Statutes, particularly when a seaman claims that he was discharged in a foreign port during the course of a voyage from San Francisco, California, to one or more ports in the Far East and back to a final Pacific Coast port of discharge in the United States, for a term of time not exceeding nine calendar months.

Even if the provisions of said Section 4580 are considered by themselves it seems clear that no American seaman can be discharged excepting by the governmental officer referred to therein and only upon satisfactory proof that at least one of the disjunctive conditions therein set forth actually exists.

Respondent contends that the legal maxim *expressio unius est exclusio alterius* is applicable.

> "As exceptions in a statute strengthen the force of the law in cases not excepted, so enumerations weaken it in cases not enumerated. Indeed, it is a general principle of interpretation that the mention of one thing implies the exclusion of another; *expressio unius est exclusio alterius.* The rule applies even though there are no negative words excluding the things not mentioned. Thus, a statute that directs a thing to be done in a particular manner, or by certain persons or entities, ordinarily implies that it shall not be done in any other manner, or by other persons or entities * * *"
>
> 50 Am. Jur., pp. 238-240, Sec. 244.

> "When a statute limits a thing to be done in a particular mode, it includes the negative of any other mode."
>
> *Botony Worsted Mills v. United States,* 278 U.S. 282, 288-289, 73 L.Ed. 379, 385.

The shipping articles provide, in effect, that petitioner was to be and remain a member of the crew from the port of San Francisco, California, to foreign ports and back to a port in the United States. These articles likewise obligated the master of the vessel to bring Mr. Elliott back to the United States unless he was lawfully discharged in a foreign port or died or absconded.

The provisions of the Revised Statutes, Sections 4573, 4574, and 4576, made it the statutory duty of the master of the vessel to bring Mr. Elliott back to the United States unless he had been "discharged in a foreign country *with the consent of the consul or vice consul there residing, certified in writing, under his hand and seal*" or he had died or absconded.

Section 4580, Revised Statutes, prohibits a consular officer from discharging a seaman in a foreign port unless it is made to appear by satisfactory evidence "that said seaman has completed his shipping agreement, or is entitled to his discharge under any Act of Congress or according to the general principles or usages of maritime law as recognized in the United States" and such officer cannot discharge a seaman unless he requires from the *master* of the vessel "*before* such discharge shall be made, payment of the wages which may then be due said seaman; * * *"

There is no evidence whatever in the record indicating that the master of the "Canada Bear" made any application to a consular officer in Japan to discharge the petitioner or that the petitioner made any application to a consular officer for his own discharge. There is no evidence whatever in the record showing that any consular officer did discharge the petitioner.

Furthermore, neither the master nor petitioner *could* have made it appear to any consular officer that petitioner had completed his shipping agreement or was entitled to his discharge under any act of Congress or according to the general principles or usages of maritime law as recognized in the United States.

Section 4596, Revised Statutes (30 Stat. at L. 760; 38 Stat. at L. 1166; 53 Stat. at L. 1147), reads, in part, as follows:

> "Whenever any seaman who has been lawfully engaged * * * commits any of the following offenses, he shall be punished as follows:
>
> First. For desertion, by forfeiture of all or any part of the clothes or effects he leaves on board and of all or any part of the wages or emoluments which he has then earned.

Second. For neglecting or refusing without reasonable cause to join his vessel or to proceed to sea in his vessel, or for absence without leave at any time within twenty-four hours of the vessel's sailing from any port, either at the commencement or during the progress of the voyage, or for absence at any time without leave and without sufficient reason from his vessel and from his duty, not amounting to desertion, by forfeiture from his wages of not more than two days' pay or sufficient to defray any expenses which shall have been properly incurred in hiring a substitute."

There is nothing in the second subdivision of said Section 4596, Revised Statutes, which provides that in the event a seaman commits any of the offenses set forth therein he would be entitled to a discharge upon application to a consular officer pursuant to Section 4580, Revised Statutes. Said second subdivision does not provide that the commission of the offenses therein set forth would entitle the master of the vessel to discharge the seaman in a foreign port.

It is held in a leading case that Sections 4529 and 4530, Revised Statutes, must be read and construed together.

"Section 4529, so far as it affects this case, provides that the master or owner of any vessel shall pay to every seaman his full wages 'in case of vessels making foreign voyages, within 24 hours after the cargo has been discharged.' The Cubadist had made a foreign voyage and had discharged her cargo at Mobile, and the situation created by the Seamen's Act, if literally construed, had arisen. The appellants contend for a literal construction. The appellees contend that, construing the act in its entirety, it is evident that the words of section 4529, 'within 24 hours after the cargo has been discharged,' refer to a discharge of cargo

upon the completion of the voyage for which the seaman shipped. This was the holding of the District Judge, and we concur in it.

Section 4529 and section 4530 should be construed together. The former provides for the payment of full wages to seamen; the latter, for half then earned wages at any port, touched by the ship, where cargo is received or discharged. The former applies to full payment on completion of the voyage, or the termination of the shipping articles, or the discharge of the seaman; the latter to partial payments to be made during the progress of the voyage. Section 4530 provides for the payment of half then earned wages 'at every port where such vessel, after the voyage has been commenced, shall load or deliver cargo *before the voyage is ended.*' During the progress of the voyage, full wages can only be demanded if half then earned wages are wrongfully denied. The section then reads as follows:

'And when the voyage is ended every such seaman shall be entitled to the remainder of the wages which shall then be due him, as *provided in section 4529 of the Revised Statutes.*'

It is clear from this reference to section 4529 that Congress intended that section to cover only the payment of full wages due, on the completion of the voyage or discharge of the seaman, and section 4530 to cover all payments to be made during the progress of the voyage. The use of the words, in case of foreign voyages, 'after the cargo has been discharged,' instead of 'when the voyage is ended,' may be attributed to their former use in the Revised Statutes, when a necessity for retaining seamen, not only until completion of the voyage, but until after discharge of cargo, existed. However this may be, reading sections 4529 and 4530 together, they form a complete system only if we attribute to section 4529 the function of regulation of final payments in full upon completion of the voyage or discharge of the seaman, and to section 4530 the

regulation of payments arising out of situations that occur during the progress of and before the time for final settlement between the seaman and the shipowner, either because of the ending of the voyage for which he shipped or the discharge of the seaman, if that first occurred.

To bring the two sections into harmonious relation with each other, it is necessary to give to the words 'after the cargo has been discharged' the meaning of a discharge upon the completion of the voyage for which the seaman shipped. There might be many complete discharges of cargo during the progress of a single voyage. In such cases, section 4530 and section 4529 would both apply, if section 4529 be given the construction contended for by appellants, and it would then come into direct conflict with section 4530. Section 4530 would entitle the seaman to only half of his wages then earned, while section 4529, if applicable to such a situation, would entitle him to full wages, even though he had not then been discharged. It will not be presumed that Congress intended to confer on seamen the right to demand, at their option, half-earned wages, or full wages, in identical situations. If section 4529 is limited to payments to be made upon completion of the voyage shipped for, and discharge of cargo thereupon, or to the discharge of the seaman, if that first occurs, there will be no such conflict between the two sections, and each will have its proper scope."

The Cubadist, 256 Fed. 203, 205-206.

A petition for a writ of certiorari filed by the seaman-libelant in *The Cubadist*, was denied on May 5, 1919 (249 U.S. 618, 63 L.Ed. 804).

The shipping articles, respondent's Exhibit "B" show that all of the members of the crew who were aboard the "Canada Bear" and who had completed the agreement that they had made when they signed the shipping articles were

paid off, signed mutual releases, and were discharged in the presence of the master of the vessel and a Deputy United States Shipping Commissioner in San Francisco, California, on June 29, 1952. The date, whether on June 29, 1952, or some date previous thereto, when the ship actually arrived at San Francisco, California, and the voyage thus ended, is not shown in the record.

Section 4549, Revised Statutes, 17 Stat. at L. 266, provides, in part, as follows:

> "All seamen discharged in the United States from merchant vessels engaged in voyages from a port in the United States to any foreign port, * * * shall be discharged and receive their wages in the presence of a duly authorized shipping commissioner, * * * except in cases where some competent court otherwise directs; and any master or owner of any such vessel who discharges any such seaman belonging thereto, or pays his wages within the United States in any other manner, shall be liable to a penalty of not more than $50."

If the petitioner was not discharged within the meaning of Section 4529, Revised Statutes, until he signed off the articles in the office of the Coast Guard official acting as Deputy United States Shipping Commissioner in San Francisco, California, on July 25, 1952, it would have been an unlawful act, prohibited by Section 4549, Revised Statutes of the United States, for respondent to have paid him any wages *before* such discharge. Pursuant to the provisions of Section 4549, Revised Statutes, respondent could not have lawfully paid to the petitioner any wages which may have been actually due at the time petitioner appeared at the port purser's office in San Francisco on July 25, 1952. This visit was prior to the time he went to the office of the United States Shipping Commissioner and signed off the articles. If he had not agreed in writing that he had no

wages coming to him when he signed off the articles in the presence of a Deputy United States Shipping Commissioner then there might have been an obligation on the part of respondent to pay him whatever wages were actually due within four days after such discharge in accordance with the provisions of the Shipping Articles; and a compliance with the law, under such assumed but not existing facts, would have required the payment of such wages in the presence of a duly authorized Shipping Commissioner.

"In its opinion before reargument the District Court, notwithstanding its conclusion that the master had sufficient cause for his failure to pay wages, ruled that the petitioner was entitled to recover double pay for the number of days which had intervened after the suit was brought. Petitioner argues here that, as there was no excuse for delay in payment after the suit was brought, the duty to pay double wages accrued from *that* date. But the liability is *conditioned* by the statute upon the refusal or neglect to pay wages '*in the manner hereinbefore mentioned, without sufficient cause.*' The quoted phrase refers to the *specified* periods *within which* the seaman's wages are directed to be paid, and the section thus imposes the liability for neglect, without sufficient cause, to pay the wages *within the prescribed period.* Petitioner seeks, by a more liberal interpretation of the words, to impose the liability for such delay in payment, without sufficient cause, as may occur at any time *after an excusable failure to pay within the prescribed period.* This possibility is *precluded* by the further provision of the section that double wages shall be paid for each day 'during which payment is delayed beyond the respective periods' within which the payment is to be made. Thus, liability for double wages accrues, if at all, from the end of the period within which payment should have been made. *It must be determined by the happening of an event within the period,* failure to pay wages without sufficient cause.

The statute affords a definite and reasonable procedure by which the seaman may establish his right to recover double pay where his wages are unreasonably withheld. But it affords no basis for recovery if, by his own conduct, he precludes compliance with it by the master or owner. He cannot afterward impose the liability by the mere expedient of bringing suit upon it." (Emphasis supplied.)

McCrea v. United States, 294 U.S. 23, 31-32, 79 L.Ed. 735, 741.

"Section 4511, Revised Statutes, and amendments (section 8300, Compiled Statutes), and the form provided in the schedule annexed, and section 4530, Revised Statutes, and its amendments (section 8322, Compiled Statutes), for the protection of seamen, relate to the voyage, and impose duties on the ship and the seamen for the voyage. Neither can renounce these duties during the voyage. These statutes on their face, and the judicial construction given them, leaves no doubt of these conclusions: (1) The master *cannot* discharge the crew, and the crew *cannot* demand wages in full, until the end of the voyage; (2) the end of the voyage is not a port of distress, but the port of destination; (3) seamen are bound to serve until the voyage ends in the port of destination, unless there has been a breach of the contract by the master as to the time of the voyage or in some other material particular; * * *" (Emphasis supplied.)

Hamilton v. United States, 268 Fed. 15, 17, Cert. den., 254 U.S. 645, 65 L.Ed. 454.

"The statutes governing shipping articles for seamen date back to a common source, an Act of 1872, 17 Stat. 266. * * * The word 'discharge' appears in many sections of the source statute and the context of several of those sections compels the conclusion that 'discharge' means the termination of the contractual obli-

> gations of a given set of articles. It is provided, for instance, that seamen 'shall be discharged *and* receive their wages in the presence of a duly authorized Coast Guard official.' The master or owner who pays wages 'in any other manner' is subject to a fine. 46 U.S.C.A., § 641 (emphasis added.) The statute thus contemplates 'discharge' and payment of wages to be simultaneous acts and there is no doubt that seamen are paid when they are signed off the articles. 'Discharge' and 'signing off' must therefore be synonymous terms."
>
> *Newton v. Gulf Oil Corp.*, 180 F.2d 491, 493.

In the light of the statutes and the case law on the subject, respondent believes that Norris, in "The Law of Seamen," Volume I, Section 387, correctly states the basic principle as follows:

> "Among the conditions of the statute (section 596) which make the penalty operative is the requirement that a 'discharge' must take place either automatically by the termination of the voyage, by process of law, or by the action of the master."

The petition and supporting brief completely fail to show the following essential elements:

1. That petitioner had duly performed *his* obligations as specified in the Shipping Articles.
2. That when he left the vessel at Yokohama, Japan, he did so with the consent of the master.
3. That if he had the consent of the master to go ashore, the date and time when his shore leave expired.
4. That at the time the master made the log-entry that Mr. Elliott had deserted the vessel at Yokohama, Japan, the said master was not, in the light of circumstances actually known to him, reasonably justified in doing so.

5. That at the time of the end of the voyage on June 29, 1952, the master was not still reasonably justified in representing to the Coast Guard official acting as deputy United States Shipping Commissioner that Mr. Elliott had deserted the vessel at Yokohama, Japan on June 18, 1952.

6. That he was discharged at Yokohama, Japan, on June 18, 1952 or June 19, 1952, or at any other specified time while he remained in Japan.

7. That the master of the vessel consented to or condoned Mr. Elliott's breach of his written contractual obligation to conduct himself in an "*orderly, faithful,* honest *and sober* manner * * * whether on board, in boats, *or on shore.*"

8. That any act or omission on the part of the master of the vessel released Mr. Elliott from his contract at Yokohama, Japan.

9. Whether or not cargo was actually discharged at San Francisco, California, upon the arrival of the vessel at that port.

10. That the neglect of the owner to pay him any wages within four days after he signed off the shipping articles containing his written concession that no wages were due and cooperated in causing the Certificate of Mutual Release stating the same thing to be delivered to the respondent was a refusal or neglect, *within said four day period,* to pay wages *without sufficient cause.*

With reference to subdivision (9), immediately hereinabove, it is the contention of respondent that a seaman claiming the penalties imposed by Section 4529, Revised Statutes, must prove whether cargo was or was not discharged at the end of the voyage and that if the evidence

shows that cargo was actually discharged that there was a refusal or neglect, without sufficient cause, to pay any wages that might be due *within twenty-four hours* of such discharge of *cargo,* or that the *seaman* was discharged *before* the discharge of *cargo.* It is the event which *first* happens after the end of the voyage which fixes the time and period within which the earned wages must be paid. In view of the requirement of the law that seamen discharged in the United States must be discharged and paid in the presence of a Coast Guard officer, it is obvious that Mr. Elliott could not lawfully have been paid his wages in *Japan* within twenty-four hours after cargo had been discharged, if in fact cargo was discharged at the end of the voyage.

If what occurred at the office of the Coast Guard official, acting as a Deputy United States Shipping Commissioner, at San Francisco, California, on July 25, 1952, does not constitute a discharge of petitioner as of July 25, 1952 (by reason of the action of the Trial Court in setting aside the mutual release), then Mr. Elliott has not yet been discharged. In this connection, however, all Judge Westover did affirmatively was to set aside the *release* executed pursuant to the provisions of Section 4552, Revised Statutes of the United States.

As codified the law provides as follows:

> "That notwithstanding any release signed by any seamen under Section 644 of this title, any Court having jurisdiction may upon good cause shown set aside such release and take such action as justice shall require; * * *" (Title 46, U. S. Code, Sec. 597.)

Keeping in mind the rule stated in the case of *Newton v. Gulf Oil Corp.*, 180 F.2d 491, 493, that " 'discharge' and 'signing off' must therefore be synonymous terms" it should

follow that Elliott's act in signing off the articles on July 25, 1952, constituted a "discharge" within the meaning of Section 596, Title 46, U. S. Code. The mutual release was not void. It was, on the other hand, a binding contract until such time as some court of competent jurisdiction set it aside, for good cause shown. During this interval the respondent had sufficient cause to refuse or neglect to pay Mr. Elliott any sum whatever or at all on account of wages.

The mutual release involved here is contained in a printed form. It was formulated, organized and printed by an agency of the United States. Petitioner has been a seaman for many years and it would be strange indeed if he had never read the statutory form of mutual release contained in any of the shipping articles he had signed. The execution of such mutual release is required by law whenever a seaman is actually discharged, at least within the United States. It is quite obvious from the provisions of Section 4530, Revised Statutes of the United States (41 Stat. 1006) that the seaman is conclusively bound by the mutual release referred to therein unless *he* can convince some court of competent jurisdiction that there is good cause shown for setting it aside. The statute does not say that the release may be set aside unless the shipowner proves facts showing that it should not be set aside. The burden of proof is clearly placed, by the language of the statute, upon the seaman who claims that the release should be set aside.

Petitioner has referred to Section 4550, Revised Statutes, 46 U.S.C. 642, but it is quite evident that his proctor has not carefully read the statute. It is quite obvious that it would have been utterly impossible for the master of the vessel to have delivered to Mr. Elliott "a full and true" or *any* "account of his wages, and all deductions to be made

therefrom on any account whatsoever" at a time "not less than forty-eight hours before paying off or discharging" the seaman, for the simple reason that the master of the vessel could not have known forty-eight hours before July 25, 1952 that the petitioner would appear before the Deputy Shipping Commissioner on July 25, 1952, for the purpose of being discharged.

The contract referred to as Shipping Articles, Respondent's Exhibit "B," is in the form *required by statute.* (Revised Statutes, Sec. 4511; 29 Stat. at L. 691; 32 Stat. at L. 829; and 37 Stat. at L. 736.) "The form given in the table marked A" in the schedule annexed to Section 4612, Revised Statutes (30 Stat. at L. 762, 764; 38 Stat. at L. 1168; 46 U. S. Code, Sec. 713) provides, in part, as follows:

> "And the said crew agree to conduct themselves in an orderly, faithful, honest, and sober manner, and to be at all times diligent in their respective duties, and to be obedient to the lawful commands of the said master, or of any person who shall lawfully succeed him, and of their superior officers in everything relating to the vessel, and the stores and cargo thereof, whether on board, in boats, or on shore; and in consideration of which service, to be duly performed, the said master hereby agrees to pay the said crew, as wages, the sums against their names respectively expressed, and to supply them with provisions according to the annexed scale."

There is nothing in the Shipping Articles which were executed by the master of the vessel and the petitioner which provides that the latter was employed on a *daily* basis. He was employed on a *monthly* basis and the language of the contract clearly means that he was to be paid by the month and not otherwise. We will assume, for the sake of argument only, that he had duly performed his

contract for the first month of the term of the employment consisting of a complete voyage to last not over nine months and that at the end of that first month he was entitled to wages for the full month. He had not, however, duly performed his contract for the *second* month which began on June 8, 1952. In so far as the Shipping Articles are concerned there is nothing contained therein which provides that the master of the vessel with whom he was required by statute to make the contract agreed that any wage would be *earned or payable* excepting at the end of each month and this was conditioned upon the due performance of the seaman's written and statutorily required contract. During the second month from June 8, 1952, to and including July 7, 1952, the seaman would have earned, if he had duly performed his contract, the gross sum of $274.79. Therefore, if he had actually earned wages in the sum of $513.50 between May 8, 1952, and June 18, 1952, it was because of some contract or agreement outside of and collateral to the statutory shipping articles. He could not have earned the gross sum of $513.50 between May 8, 1952, and June 18, 1952, at the monthly wage rate as fixed by the Shipping Articles at the sum of $269.99 per month from May 8, 1952, to May 15, 1952, and thereafter at the monthly rate of $274.79.

Although it is not in the record, in all probability the difference between the Shipping Articles agreement as to the total wages agreed to be paid by the *master* and the amount opaquely stipulated to at the time of the trial can be accounted for on no premise excepting a collective bargaining agreement between the owner of the vessel and the union of which the petitioner was a member. It has not been held up to this time, so far as the undersigned proctor is aware, in any case where such collateral agreement was *not*

definitely included in the Shipping Articles by reference thereto or quoting therefrom, that a refusal or neglect to pay whatever amount may have been due *exclusively* by reason of the terms and conditions of such collateral agreement within four days after an actual discharge will subject the master or the owner to any penalty whatever.

It is respectfully contended that as the burden of proving every essential element of an actual right to recover the penalty sought by him rested upon the petitioner, he should have offered some affirmative evidence on this important subject.

It is respectfully submitted that Sections 4511, 4512, 4521, 4523, 4527, 4529 and 4612 of the Revised Statutes are *in pari materia* and must be construed together in order to ascertain what the Congress intended to include within the meaning of the word "wages" as used in Section 4529. It is also respectfully submitted that if this is done, the only reasonable conclusion to draw is that the Congress was legislating only with reference to the wages which are actually due in accordance with the statutory form of shipping articles. Certainly it cannot be contended that the *master of the vessel* was legally obligated to pay Mr. Elliott one cent which was not actually earned in accordance with the shipping articles. The statute seems to put the master and the owner in the same category in the event of a refusal or neglect, without sufficient cause, to pay wages in the manner required by said Section 4529, Revised Statutes.

> "When articles are signed by a crew for a voyage, all bargaining, individual or collective, is ended for the duration of the voyage. A contract is made, binding both owner and seaman, that is lawful, if the articles comply with the statutes, and should be lived up to scrupulously."
>
> *Rees v. United States*, 95 F.2d 784, 792.

It is provided by statute that the shipping articles *shall* contain "Any stipulations in reference to advance and allotment of wages, *or other matters not contrary to law.*" (Title 46, U. S. Code, Sec. 564; R. S. Sec. 4511; emphasis supplied). Therefore, to be binding upon the *master* of the vessel any collateral agreement to pay wages in addition to those specifically set forth in the Shipping Articles must be set forth in the Shipping Articles.

It is therefore respectfully contended petitioner has failed to prove facts sufficient to entitle him to collect any penalty whatsoever. The statute entitled Judge Westover, in the event he believed that there was good cause shown to set aside the mutual release to "take such action as justice shall require." This certainly authorized the Trial Judge to exercise a judicial discretion. In the exercise of that discretion the Trial Judge decided that the only action which justice required was the rendition of a judgment in the sum of $254.04, with interest at the rate of 7% per annum from June 20, 1952, and costs in the sum of $38.50.

This action of the court of first instance was affirmed by the Court of Appeals and the petition shows no error of law in this respect.

CONCLUSION

For the foregoing reasons, it is contended that the petition for a writ of certiorari should be denied.

Respectfully submitted,

LASHER B. GALLAGHER

Proctor for Respondent,
Pacific Far East Line, Inc.

Appendix follows

APPENDIX

A. At the threshold, the fiction that all seamen are "wards of the court" is challenged as indefensible.

The Supreme Court of the United States was and is without lawful power to create a binding rule of law that in *every* case where a release is executed by a person whose occupation is that of "seaman", the burden is upon the person who pleads a release executed by such "seaman" to show by *affirmative* evidence that it was executed freely, without deception or coercion, and that the "seaman" executed the release with full understanding of his "rights". The "due process of law" clause of the Fifth Amendment prevents *any* court from creating such rule when the sole basis for it is the occupational status of the releasor.

The court-made rule refers specifically to the question of burden of proof with respect to releases; but it is based upon the assumed premise that *solely* by reason of the occupational status of *seaman* and the existence of an employer-employee relationship upon the date of the *accrual* of his cause of action all of the presumptions against their validity are justified and that, therefore, the *releasee* must not only controvert but *overcome* the presumptions. These court-created presumptions are unconstitutional for the same reasons that they would be if the Congress had established them by statute.

> "The rules of evidence, however, are established not alone by the courts but by the legislature. * * * But the due process clauses of the Fifth and Fourteenth Amendments set limits upon the power of Congress or that of the state legislature to make proof of one fact or group of facts evidence of the existence of the ultimate fact on which guilt is predicated.
>
> * * * * * * *

> Under our decisions, a *statutory* presumption *cannot* be sustained if there be *no rational connection* between *the* fact proved and *the* ultimate fact *presumed*, if the inference of the one from proof of the other is arbitrary because of lack of connection between the two in *common experience*. This is not to say that a valid presumption may not be created upon a view of relation broader than that a jury might take in a specific case. But where the inference is so strained as not to have a reasonable relation to the circumstances of life as we know them it is not competent for the legislature to create it as a rule governing the procedure of courts." (Emphasis supplied.)
>
> *Tot v. United States*, 319 U.S. 463, 467, 468; 87 L. ed. 1519, 1524.

A statute or court-made rule creating a presumption that is arbitrary, or that operates to deny a fair opportunity to repel it, violates the guarantee of the Constitution that no person shall be deprived of his or its property without due process of law, since legislative or judicial fiat may not take the place of fact in the judicial determination of issues involving substantial property rights (*Western & A. R. R. v. Henderson*, 279 U.S. 639, 73 L. ed. 884; *Bandini Petroleum Co. v. Superior Court of California*, 284 U.S. 8, 76 L. ed. 136; 110 Cal. App. 123).

Legislation (or court-made rule) that proof of one fact (or the conceded existence of a particular *occupational* status) shall constitute *prima facie* evidence of the main fact in issue violates the due process of law clause when the relation between *the* fact found and the presumption is not *clear and direct* (*Adler v. Board of Education*, 342 U.S. 485, 96 L. ed. 517).

The Court, in the case of *Garrett v. Moore-McCormack Co.*, 317 U.S. 239, 87 L. ed. 239, impliedly limits the artificial

erection of the well-nigh incontrovertible presumptions of invalidity to a single specie of contracts which a seaman has a lawful right to execute under the constitution and statutes of the United States and the constitutions and statutes of the various states. The only specie of the genus "contract" referred to in the "rule" is "a seaman's release". There are many contracts which a person who makes his living as a seaman may execute or may enter into with other persons. For example, if one seaman lends money to another seaman, while aboard a vessel on navigable waters of the United States, and the one who borrows the money executes a promissory note in favor of the other and acknowledges therein the receipt of the money which is the subject of the promissory note, is the promissory note presumptively invalid? If in the assumed case the seaman who borrowed the money and executed the promissory note repays the money and procures a receipt and release with reference thereto and the lender acknowledges on the face of the receipt the payment of the money and specifically releases the borrower of and from all claims and demands predicated upon the promissory note, what would be the rule with reference to the burden of proof if the seaman who had loaned the money brought suit against the one who had borrowed the money and the latter pleaded *in haec verba,* as his sole and only defense, the receipt and release which had been executed by the lender? Which one of them would have the burden of proving by a preponderance of evidence that the receipt and release was invalid upon one of the grounds recognized by statute or equitable principles as the bases of invalidity of a contract which is apparently lawful on its face? In view of the rule stated in the Garrett case, can a "seaman" execute a presumptively valid and binding mortgage or a presumptively valid and binding

release of a claim for damages against a person who was *not his employer* at the time it accrued, arising out of an automobile accident suffered while the seaman is actually engaged in the course and scope of his employment as a seaman and member of the crew? Can a seaman enter into a valid contract of marriage? If contracts of the type immediately hereinabove specified are presumptively valid and binding upon every "seaman", upon what possible, reasonable or rational ground can a single specie of the entire genus "contract" be exercised therefrom and the "court-made" burden of proof rule of the Garrett case be applied exclusively to an *ex*-employer of an individual possessing normal faculties of perception who happened, at the time of the accrual of an alleged or claimed cause of action, to be a seaman and member of the crew of a vessel owned or operated at said time by the *ex*-employer?

The release involved in the case at bar was not executed by appellant *as* a "seaman". No fiduciary or confidential relationship of any kind existed between the petitioner and the respondent *at any time*, including the period when petitioner was acting *as* a seaman and member of the crew of respondent's vessel.

The court-made "burden of proof" rule, if intended to apply to all releases executed by "seamen", is premised exclusively upon the single fact that *at the time* Garrett *sustained bodily injuries* he *was* a seaman and member of the crew of a Moore-McCormack Company vessel. Upon this fact alone, the Court by judicial fiat created the following conclusive presumption: The relationship between Garrett and Moore *at the time of the execution of the release* was equivalent to that of "guardian and ward" or "trustee and cestui"; and the following "disputable" presumptions: 1. That the release was not executed freely. 2. That it was

procured by deception or coercion. 3. That it was executed by Garrett without a full understanding of his rights. 4. That the nature of the medical and legal advice available to Garrett at the time he signed the release was not adequate to enable him to have a full understanding of his rights. 5. That the amount paid as a consideration, regardless of how much or little, was inadequate.

Assuming that the language used by the Court is broad enough to apply the burden of proof rule enunciated therein to *all* cases involving seamen who have executed releases, it seems obvious that the Court did not intend to do so.

What any court of appellate jurisdiction may have said with reference to any rule of law in a particular case must be read and understood in the light of the facts to which the rule of law was applied.

In *Garrett v. Moore-McCormack Co.*, 317 U.S. 239, 87 L. ed. 239, Garrett placed his signature on a full release for a consideration of $100. Garrett denied

> "that he had any knowledge of having signed such an instrument, (and) asserted that if his name appeared on it, his signature was obtained through fraud and misrepresentation and without 'legal, binding and valid consideration.'
>
> The petitioner did execute a release for $100 * * *. His testimony was that his discussion with respondent's claim agent took place while he was under the influence of drugs taken to allay the pain of his injury. That he was threatened with imprisonment if he did not sign as directed and that he considered the $100 as payment of wages. The respondent's evidence was that the $100 was paid not for wages but to settle all claims growing out of the petitioner's injuries, that the petitioner had not appeared to be under the influence of drugs, and that no threats of any kind were made."
>
> *Garrett v. Moore-McCormack Co.*, 317 U.S. 239, 241; 87 L. ed. 239, 241.

Thus if Garrett's testimony was accepted by the jury in preference to that of the claims agent, the only contract which Garrett had made was a release with reference to wages. This was owing to him, as a matter of absolute right, whether the $100 was paid for wages actually earned or on account of wages to the end of the voyage. In that case, there would be no consideration whatever for the release of Garrett's claim for damages pursuant to the Jones Act.

If, in fact, the Moore-McCormack Co. did not actually owe the total sum of $100 on account of wages, the difference between that amount and the total sum paid would not have validified the release insofar as it related to the claim for damages if the jury accepted his version that his signature was procured through fraud and misrepresentation, or that he was under the influence of drugs at the time of signing the same and threatened with imprisonment if he did not sign as directed. A finding by the jury in his favor with reference to these contentions would necessarily require an ultimate finding that he had not entered into the contract of release at all and that the act of executing it was induced by fraud, duress and coercion.

The opinion of the Court shows on its face that it was not called upon in that case to consider or decide, as a disputed question of law, the question of burden of proof which would have been applicable if Garrett's case had been tried on the admiralty side of a United States District Court.

> "Respondent made a motion for a new trial and judgment non obstante veredicto which under the Pennsylvania practice was submitted to the trial court en banc. That court gave judgment to the defendant non obstante veredicto, not upon an appraisal of disputed questions of fact concerning the accident, but

because of a conclusion that petitioner had failed to sustain the burden of proof required under Pennsylvania law to invalidate the release. It conceded that 'in Admiralty cases, the responsibility is on the defendant to sustain a release rather than on a plaintiff to overcome it,' but concluded that since petitioner had chosen to bring his action in a state rather than in an admiralty court, his case must be governed by local, rather than admiralty principles."

Garrett v. Moore-McCormack Co., 317 U.S. 239, 241-242; 87 L.ed. 239, 241-242.

Moore-McCormack Co. did not present to the Court in the *Garrett* case any *dispute* with reference to the *validity* of the so-called burden of proof "rule" in admiralty and maritime cases as it had been previously enunciated by federal courts in cases tried on the admiralty side of said courts. The only point submitted by the company to the Court for decision, as a disputed question of law in the *Garrett* case, was that the state courts of Pennsylvania should have applied the state rules with reference to burden of proof rather than what Moore-McCormack *conceded* was a valid burden of proof rule applicable to similar cases in the courts of admiralty. The real dispute submitted to the Court was not whether the so-called admiralty burden of proof rule was valid but whether it was part of the substantive maritime law or merely an incident of procedure. The Court held that the admiralty rule which was conceded by Moore-McCormack Company to be valid was a part of the substantive admiralty law and therefore applicable to the trial of the action in the state court.

The decision of the Court, therefore, is not authoritative precedent for the proposition that the burden of proof rule therefore enunciated by courts sitting in admiralty was a valid exercise of the *judicial* function.

The mere fact that the Court recapitulated the "assumed" admiralty burden of proof rule with reference to releases in its opinion does not support a contention that it was *deciding* the *validity* of that rule as a *disputed question of law* in the case.

For the foregoing reasons it is submitted that the decision is not authoritative precedent in the instant case.

The mere fact that the Court has stated the rule, without also determining that it possessed power under the Constitution to do so in the face of a contention that it did not, does not amount to a decision that such rule is constitutional.

Respondent contends that the decision of the Court which, in effect, *arbitrarily* places *all* "seamen" in a *non sui juris* category is in direct conflict with the due process clause of the Fifth Amendment. No recognized concept of the bases of "judicial notice" will support it. There is no statute enacted by the Congress which supports it. There is no reasonable or logical ground upon which to premise a rule placing all adult "seamen" in a presumptively *non sui juris* status and at the same time recognizing that if the *identical* persons happened to work for a railroad the ordinary rules with reference to the burden of proof of the alleged invalidity of a release will prevail.

The Congress has enacted remedial legislation for the benefit of employees of interstate common carriers by railroad. The Jones Act by reference thereto adopts certain of those statutes. Each of the statutes was enacted for the purpose of conferring substantial benefits upon the men who work in the respective railroad and maritime fields. The courts have held many times that each of these statutes must be *liberally* construed in favor of the workers. The Congress has placed *all* of these workers in the *same general*

category with respect to their rights of action for damages and the defenses which the employer may urge. There is, therefore, no *reasonable* ground upon which to differentiate between them with reference to burden of proof of *any* issue which may be raised by the pleadings in an action based upon either of these or any other statutes. Any attempt to unreasonably and arbitrarily discriminate in reference to the burden of proof in a controversy involving the validity of releases signed by railroad workers and maritime workers is prohibited by the "due process of law" clause, Fifth Amendment.

There is no reasonable ground upon which to differentiate between a release executed by First Doe, a seaman; Second Doe, a railroad brakeman; Third Doe, a carpenter; Fourth Doe, a bricklayer; Fifth Doe, a plumber; and Sixth Doe, an electrician, for the *sole* reason that their occupations are in different industrial fields. Let us assume that First Doe and Second Doe are *identical* twins in all respects, mental and physical, excepting that one works upon a vessel and the other works in a railroad yard. Upon what basis, other than one which is purely fictitious, arbitrary and capricious, can we reach the result that a release executed by one is presumptively valid but presumptively invalid when executed by the other? If John Doe happened to work for a corporation which operated a railroad and ships and sustained two separate injuries, one while working on a flat car as a brakeman and another while working for the same employer as a seaman and member of the crew of a vessel on navigable waters and for a valuable consideration executed separate releases with respect to each claim for damages against his former employer would the former employer be in the status of trustee as to the second claim and in an "at arm's length" status as to the

first claim? The negative answer is obvious. Any attempt to declare by judicial fiat that the mere fact of occupational statuts as a seaman is sufficient to put his former employer in the status of trustee or to put *every* seaman in the category of persons who are *non sui juris* is arbitrary, unreasonable and in contravention of the "due process of law" clause of the Fifth Amendment, Constitution of the United States. The *arbitrary* discrimination between persons *in similar circumstances* is a denial of "due process of law" (*Wallace v. Currin*, 95 F.2d 856; affirmed, sub-nom. *Currin v. Wallace*, 306 U.S. 1, 83 L.ed. 441; *Bolling v. Sharpe*, 347 U.S. 497, 98 L.ed. 884).

There are at least several maritime unions in the United States. The officers and members of these unions are "seamen." Are the collective bargaining agreements executed by such unions and the operators of ships presumptively invalid for the sole reason that the members of the union and the officers who negotiate the contracts of the union and the officers who negotiate the contracts for and on behalf of the members are "seamen"? During the negotiations leading up to the execution of such collective bargaining agreements it is obvious that a vast majority of the members of the various unions are actually employed as seamen on the vessels being operated by the various employers. Are all of these collective bargaining agreements presumptively invalid with respect to *such* members of the union for the sole reason that they are seamen *actually* employed as such during the negotiations preceding and at the time of the execution of such contracts?

A release is nothing but a contract. The same is true with reference to a collective bargaining agreement. If the sole fact of occupational status as seamen is sufficient in and of itself to raise all of the presumptions hereinabove referred

to in a case involving the validity of a release then exactly the same presumptions must be applied to a dispute concerning the binding effect of a collective bargaining agreement. The *same* "burden of proof" rule which is *lawfully* applicable to a dispute over the validity of a release must be applied to a dispute over the validity of such collective bargaining agreement. If the rule of the Garrett case is applicable to contracts of release involving an ex-employer of a "seaman" it should be applied with more vigor to a collective bargaining agreement negotiated and executed while the employer-employee relationship is in actual existence. Are the ship-operating employers of this nation now justified in refusing to negotiate or contract with the seamen as a class because the law provides that they do so at their peril and that the contract will not be binding on the seamen unless the employers are able to prove by affirmative evidence, whenever its validity is in issue, that none of the recognized grounds upon which contracts can be rescinded in equity is available to the seamen? The mere statement of the questions seems to demonstrate how illogical an affirmative answer would be.

The statutes of the United States require the master of every vessel about to engage in a foreign or intercoastal voyage to enter into a written contract with all members of the crew. Are these contracts (shipping articles) presumptively invalid and of no binding effect upon the various members of the crew merely because they are "seamen"? If a release is presumptively invalid because the seamen who execute them are "treated in the same manner as courts of equity are accustomed to treat young heirs dealing with their expectancies, wards with their guardians, and cestuis que trust with their trustees" then the contracts consisting of the shipping articles are likewise presumptively invalid

for the same reason. The Congress, by enacting the statutes prescribing the form and substance of the required shipping articles, and permitting the addition of any other conditions not contrary to law, has certainly indicated that it was of the view that seamen as a class are in all respects legally competent to fully understand and enter into *binding* contracts with their employers through the masters of the various vessels involved.

If *seamen as a class are competent to fully understand and enter into a presumptively valid contract of employment they are certainly competent as a class to enter into a presumptively valid contract of release.*

Title 28, U. S. Code § 1861 provides, in part, as follows:

> "*Any* citizen of the United States who has attained the age of 21 years and resides within the judicial district, *is* competent to serve as a grand or petit juror *unless:* * * *
>
> (2) He is *unable to read, write, speak and understand* the English language.
>
> (3) He is *incapable*, by reason of *mental or physical infirmities* to render efficient jury service.
>
> (4) He is incompetent to serve as a grand or petit juror by the law of the State in which the district court is held." (Emphasis added.)

Section 198, California Code of Civil Procedure provides, in part, as follows:

> "A person is competent to act as a juror if he be:
>
> 1. A citizen of the United States of the age of twenty-one years who shall have been a resident of the state and of the county or city and county for one year immediately before being selected and returned;
>
> 2. *In possession of his natural faculties and of ordinary intelligence and not decrepit;*
>
> 3. Possessed of sufficient knowledge of the English language." (Emphasis added.)

This Court will notice that neither the Congress of the United States, nor the legislature of the State of California were of the opinion that "as a matter of public policy", or for any other reason, seamen, as a class are presumptively *non sui juris*. If such presumptive *non sui juris* status is so well recognized as to be a matter of common knowledge and therefore a subject of judicial notice without proof of the fact it would seem that the legislative bodies of the United States and of the State of California, should know about it and take notice of it by excepting all seamen from jury service. In fact the statutes of every State of the United States with reference to the qualifications of jurors could be quoted without finding in a single one of them any express or presumptive disqualification of seamen as a class.

Likewise there is nothing in the Constitution, the statutes enacted by the Congress, the constitutions of the various States or the statutes enacted by the legislative body of any State which gives the slightest indication that seamen as a class are presumptively disqualified to hold *any* elective or appointive office which does not require special knowledge such as a degree as a Doctor of Medicine or a degree as a Bachelor of Laws, etc. Jurors are required to read and understand exhibits. They are required to have sufficient intelligence to understand the law applicable to a particular case upon hearing it read to them only once, when some lawyers are unable to understand it when they are given an opportunity to read it over and over again.

If a seaman happened to be called as a prospective juror in a United States District Court, and upon announcing the fact that his occupation was that of "seaman", would any Justice of this Court, if sitting in a District Court, allow a challenge for cause upon the ground that there is a pre-

sumption raised by the rule announced by the Court that such seaman, merely because of his occupational status, is *non sui juris?* The mere statement of this question should be enough to illustrate the soundness of the contentions asserted by the respondent in the instant case.

It is therefore respectfully contended that the "burden of proof" rule of the *Garrett* case is unqualifiedly and unquestionably unconstitutional.

The "court-made" burden of proof rule enunciated in the Garrett case is based upon a series of "court-made" presumptions. Reading the language of the Court literally it requires any person pleading a release executed by one whose occupational status was that of a seaman at the time of the accrual of a claimed cause of action, to prove by *affirmative* evidence that the "seaman" executed the release with a *full* understanding of his *rights* and that *competent* medical and legal advice were and each thereof was available to the "seaman" at the very instant when he signed the release. Thus, in order to question the seaman as to *his* knowledge of his "rights", an *ex*-employer, is required, by this rule, to be a lawyer or at least know everything that a competent lawyer would know about the various matters underlying the bases of possible liability imposed by statute or the General Maritime Law upon the employer of a seaman; and the nature and limitations of defenses available to such employer. The *ex*-employer of such "seaman" pursuant to this "court-made" rule, would be required to prove by a preponderance of evidence that the "seaman" *fully* understood all of the ramifications of the Merchant Marine Act of 1920, Section 33, including *all* of the statutes of the United States modifying or extending that part of the Federal Employers' Liability Act relating to personal injuries suffered by railroad employees (46 U.S.C. 688);

and all of the bases of liability imposed upon the owner of a vessel for the benefit of a member of the crew thereof in the event such member of the crew suffered an injury in consequence of the unseaworthiness of the ship or a failure on the part of the owner thereof to supply and keep in order the proper appliances appurtenant to the ship; and that contributory negligence, in either event, is not a complete defense; and that assumption of risk is in neither event a defense at all; and that the "seaman" *fully* understood *all* of the elements of burden of proof, proximate cause, and measure of damages.[1] This places an intolerable, unreasonable and arbitrarily discriminatory burden upon the *ex*-employer of the "seaman". Inconceivable as it seems to be, the rule goes even further. It requires the employer to prove by a preponderance of evidence that the *nature* of the *legal* advice *available* to the seaman was of such caliber as to make it certain that the "seaman" at the *instant* he signed the release, had a *full* understanding of his legal rights and that the *nature* of the *medical* advice available to the "seaman" at the very instant he signed the release was such as to make it certain that he *fully* understood the nature and extent of his injuries. The *ex*-employer could not meet this part of the "rule" without showing that *at the time of signing* the release, the "seaman" had a competent lawyer and doctor at his side or at least available for telephone conferences. But this, astounding as it may appear, is not all! The "court-made" burden of proof also requires the ex-employer who has been stupid enough to make a settlement with a "seaman" in the first place, (and therefore should be tenderly treated, as a ward of the court) to prove by a

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1. This means that a corporate or individual ex-employer must violate the law which prohibits corporations from practicing law and which prohibits individuals from so doing unless duly licensed. Giving advice as to the law is "practicing law".

preponderance of evidence to the satisfaction of a jury, that the *ex*-employer paid the "seaman" as a consideration for the execution of the release, a sum of money which the jury would consider to be an adequate consideration therefor.

These "court-made" presumptions are in the general run of cases, for all *practical* purposes, incontrovertible. In the average case they erect an artificial and arbitrarily discriminatory barrier which deprives the ex-employer-defendant of a reasonable or fair opportunity to even *controvert* the presumptions.

The "court-made" rule imposes the obligation upon the ex-employer to do more than merely controvert or evenly balance these artificial presumptions. In all litigation where the parties do not occupy a confidential relationship, the presumptions usually applicable are designated as *disputable* presumptions. In such cases the party against whom the disputable presumption is applied must offer evidence to controvert, not overcome, the presumption. If the disputable presumption is controverted by the adverse party the party upon whom the burden of proof is imposed must introduce other affirmative evidence, direct or indirect, sufficient to constitute a preponderance of evidence in favor of his contentions.

In the case of *Garrett v. Moore-McCormack*, 317 U.S. 239, 87 L. ed. 239, the Court not only referred to the decision written by Justice Story sitting on Circuit in 1823, in the case of *Harden v. Gordon*, 2 Mason 541, Federal Case No. 6047, 11 Federal cases 480, but quoted therefrom.

The strange thing about this subject is that the Court did not quote from or refer to the part of Justice Story's Opinion which was specifically applicable to the subject of the settlement of disputed seamen's claims and the burden of proof in cases involving releases signed by a seaman.

The part of the Opinion quoted by the Court had reference to matter which had been inserted, *in handwriting,* in a printed form of a contract of employment, which most of the witnesses contended was not on the document at the time it was signed by the seamen.

In a subsequent part of the same Opinion, when Justice Story got down to the question of the burden of proof in respect of releases, this is what the Court said:

> "In every view, which the court has been able to take of the point now under consideration, the respondents have failed to establish, that they were not originally liable for the charges of sickness claimed by the libellant. But it is insisted, in the last place, that the claim, whatever might have been its original validity, has been completely adjusted and settled by the parties. And a receipt, given by the libellant, is relied upon as satisfactory proof of the fact. In respect to instruments of this nature, however general and comprehensive their terms may be, there is no pretence to say, that they have a binding *and conclusive* effect. The most that can be attributed to them, is that they *afford prima facie evidence of all that they purport to declare,* and *that they are to stand, until overthrown by counter proof from the other party.* They do not arrogate the high prerogatives, which the common law attributed to releases under seal; and even these may be *set aside in equity,* when *surprise, fraud, mistake,* or *undue influence have intervened to the material injury of the party.* It need hardly be said, that *courts of admiralty* in the administration of their duties, *seek to follow the general principles of justice, rather than technical rules, and consequently avail themselves more of doctrines founded in general equity,* than in the inflexible strictness of the common law. They have not the rashness to impute blame to the latter, for they are not insensible of its excellence. But they understand, that the common law does not affect to apply remedies

to all cases of injustice; and leaves to other courts the full right to pursue a more enlarged equity, whenever their constitution enables them to favour and support it. When a receipt is given in full of all demands, it is not to be taken in the admiralty as *conclusive. It is open to explanation,* and upon *satisfactory* evidence may be restrained in its operation. *But the natural presumption is in its favour,* and *that* presumption will *prevail, until it is displaced by direct proof or strong circumstances.* Indeed in cases of doubtful or conflicting claims, where a compromise takes place, and receipts are given, as final discharges between the parties, upon deliberate consideration and in good faith, *there is the greatest reason to uphold these instruments, for they tend to general repose and security.* But when there has been no such compromise; when there has been an entire mistake of right, or an unobserved comprehensiveness in the language, reaching beyond the matters under settlement, there would be gross injustice in refusing the injured party an equitable relief. These observations apply to general receipts. But when, as in the present case, the receipt is merely annexed to the foot of an account, and admits the payment of the balance only, it is to be viewed merely as a stated account, and confined in its operation to the items, which are specified. It cannot by any ingenuity be made to reach other claims which it neither recognizes nor repudiates. Now a stated account is liable to be impeached; and in a fit case the party is admitted to surcharge and falsify it. If errors and mistakes are apparent on the face of it, or the party comes with a strong case, *recenti facto,* courts dealing in equities are in the constant habit of affording relief. And, what presses with more force on the present occasion, there are situations of peculiar influence and confidence between parties, in which the opening of settled accounts is very reluctantly refused, and very easily permitted. But it is not necessary to examine

this matter very minutely, because, in the case before the court, there is no settlement of any claim, except that of wages and an inconsiderable item for medicines. The other items are not even mentioned in the account; and it is signed with an express exception of errors. It therefore concludes nothing, and is now open to correction as to the item of medicines, for which, upon the principles already stated, the libellant is not liable. As a receipt, or as a stated account, it presents no bar whatsoever to the controverted claims; and if a final settlement of these claims is to be established upon evidence *aliunde,* that evidence has not as yet been produced. On the other hand, such a settlement is utterly denied by the oath of the libellant, and that oath is supported by the exception of errors on the settled account. This point of defence may then be dismissed without farther comment, as sustained neither de facto, nor de jure." (Emphasis supplied.)

Harden v. Gordon et al., 11 Fed. Cas. 480, 487-488.

Respondent respectfully submits that this "court-made" rule of "segregation" or "classification" is so arbitrarily discriminatory that it is incontrovertibly repugnant to the due process of law clause of the Fifth Amendment. It is also a violation of the constitutional right of every individual who happens to make his living as a seaman to enter into any contract which is not prohibited by or contrary to any public-policy statute enacted by the Congress or the legislative body of the particular state where the contract happens to be executed.